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SUNCAST SDN BHD

v.

PADANG INDAH SDN BHD

B

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[COMPANIES (WINDING-UP) NO: 28-266-2003]
20 AUGUST 2007

- C **COMPANY LAW:** *Sale of land - Sale by receiver and manager of company - Application for validation of sale in the event of company winding-up - Whether receiver and manager entitled to sell without taking proceedings under National Land Code - Whether Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors distinguished - Whether receiver and manager empowered to sell under power of attorney - Companies Act 1965, s. 223*
- D

E The respondent obtained banking facilities from Arab-Malaysian Finance Berhad ('the bank') which were secured, amongst others, by charges over the respondent's assets and an undertaking by the respondent given by way of a debenture. The respondent defaulted in its repayment obligations as a result of which the bank, in exercise of its rights under the debenture, appointed a receiver and manager ('R & M') over the assets of the respondent on 17 April 2003. The R & M in discharge of his duties carried out a series of tender exercises for the sale of the respondent's land and assets thereon ('the land') and subsequently accepted the highest offer for the land in the sum of RM25,300,00 by executing a sale and purchase agreement dated 14 September 2006. On 1 December 2003 the petitioner had presented a winding-up petition against the respondent. The respondent now applied, pursuant to s. 223 of the Companies Act 1965, *inter alia*, to validate the sale of the land by the R & M as a safeguard in the event of an order for winding-up made against the respondent. The respondent also sought to validate the actions taken by the R & M to sell the land without having to apply for a judicial sale under the National Land Code ('NLC').

The petitioner opposed the application raising the following issues:

- I (1) that the R & M was not entitled to sell the charged land without taking proceedings under the National Land Code ('NLC') based on the case of *Kimlin Housing Development Sdn*

Bhd v. Bank Bumiputra (M) Bhd & Ors; (2) the power of attorney appointing the R & M pursuant to the debenture was invalid; (3) the sale price of the land was grossly undervalued; and (4) that it was inequitable to allow the bank to take all the proceeds of the sale since the petitioner obtained judgment prior to the creation of the said debenture.

Held (allowing the respondent's application):

- (1) In *Kimlin's* case, there was no express provision appointing the R & M as the attorneys of the borrower company. In the present case, there was a provision for the appointment of an attorney. Also, the debenture herein empowered the R & M to act as lawful attorney and agent of the respondent and to exercise the powers thereunder. Furthermore, in *Kimlin*, the chargor/company was already wound up whereas the respondent herein was yet to be wound up. *Kimlin* was therefore distinguishable on the facts and not applicable. On the contrary, the principal enunciated in the case of *Melantras Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* was applicable. In that case it was held that the provisions of the NLC prescribing for judicial sale did not apply because the R & M was acting as agent of the chargor under a valid power of attorney. It followed that the R & M could act and exercise the power under the debenture *vis-à-vis* the power of attorney to sell the land without taking proceedings under the NLC for a judicial sale. (paras 9, 11 & 12)
- (2) The issue in respect of the petitioner's contention that the power of attorney appointing the R & M as attorney of the respondent was invalid and/or void for uncertainty was never raised in any of the petitioner's affidavit. The petitioner could not now challenge the power of attorney and/or the debenture. In any event, the evidence showed that the power of attorney was clearly valid and not void for uncertainty. (para 13)
- (3) There was no evidence that the land could have been sold at the sale price of RM72.5 million. The valuation report stated that its market value was RM26.7 million. The offers received by the respondent from the open market were all in the region of RM15 million and RM26.6 million. In addition, there were various efforts made by the R & M to sell the land

- A according to its true commercial value. Those efforts included the open tender exercise by way of public advertisements in the newspapers. The affidavit evidence established that the price of RM25.3 million was a true commercial market value of the land through the various open and closed tenders exercise carried out. On the other hand, there was no concrete proof to support the petitioner's allegation that the market value was RM72 million. Hence, the land was sold at market value and not grossly undervalued as alleged by the petitioner. (paras 14 & 15)
- B
- C (4) The petitioner who was an unsecured creditor could not override the bank's legal right as a secured creditor. In the event of a foreclosure, the bank would be the first to receive the full proceeds of sale of the land as a secured creditor. Hence, equity would not assist the petitioner. In the event of an order for winding-up made against the respondent, the bank would still be entitled to be paid first in preference over other unsecured creditors of the respondent which included the petitioner (*Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)*).
- D
- E (paras 16 & 17)

Case(s) referred to:

Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation) [1995] 3 CLJ 316 FC (**fol**)

- F *HSBC Bank Malaysia Bhd v. Tirathrai Sdn Bhd* [2003] MLJU 353 (**refd**)
K Balasubramaniam (Liquidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors [2005] 1 CLJ 793 CA (**refd**)
Kimlin Housing Development Sdn Bhd v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274 SC (**dist**)
- G *Melantras Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2000] 3 CLJ 127 CA (**refd**)
Melantras Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86 FC (**refd**)
Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA (**refd**)

H Legislation referred to:

Companies Act 1965, ss. 108, 223

For the petitioner - Gan Techiong; M/s Gan & Lim

For the respondent - Yeoh Cho Kheong (Richard Yeoh with him); M/s Ranjit Ooi & Roberts Low

- I *Reported by Usha Thiagarajah*

JUDGMENT**A****Azahar Mohamed J:**

[1] By way of a summons-in-chambers in encl. 21 dated 20 October 2006, and supported by the affidavit of the receiver and manager dated 19 October 2006, the respondent, pursuant to s. 223 of the Companies Act 1965 ('the Act'), sought, *inter alia*, the following orders:

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1. That the Sale and Purchase Agreement dated 14.9.2006 ("the Sale and Purchase Agreement") entered into by the respondent with Common Development (M) Sdn. Bhd. for the sale of a piece of land held under Geran No. 42286 Lot 2431, Daerah Pontian, Mukim Ayer Masin, Negeri Johor Darul Takzim ("the Land") and the assets thereon belonging to the respondent (collectively with the Land, hereinafter referred to as "the Assets") is not a disposition of the property of the respondent and is therefore not void within the meaning and purport of Section 223 of the Companies Act 1965 ("the Act") in the event of an Order for the winding-up of the respondent being made on the Petition;

C**D**

2. In the alternative to prayer (1) above, that the sale of the Assets under the Sale and Purchase Agreement be validated pursuant to Section 223 of the Act in the event of an Order for the winding-up of the respondent being made on the Petition;

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3. Further to prayer (2) above, that notwithstanding and in the event of a winding up of the respondent, the receiver and manager of the respondent, Lim Tian Huat, is duly empowered by the terms of the Debenture dated 27.1.1999 between Arab-Malaysian Finance Berhad and the respondent ("the Debenture") and the power of attorney therein contained in favour of a receiver and manager appointed pursuant to the Debenture to do all acts and/or matters and/or execute any and all documents incidental to and/or in connection with the Sale and Purchase Agreement in the event of an Order for the winding-up of the respondent being made on the Petition;

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- A 4. Further to prayer (3) above, that all documents executed
prior hereto and/or to be executed by the receiver and
manager of the respondent, Lim Tian Huat, in respect of the
Sale of the Assets including but not limited to the Sale and
Purchase Agreement and the Memorandum of Transfer in
B respect of the Land be validated pursuant to Section 223 of
the Act in the event of an Order for the winding-up of the
respondent being made on the Petition.

[2] At this stage, I want to point out that the respondent does not intend to pursue prayer (1) above.

- C [3] It is important to set out the factual background and the
sequence of events leading to the application in encl. 21. The
matter arises in this way. The respondent had obtained two
banking facilities from Arab-Malaysian Finance Berhad (the rights
D of which have accrued to AmBank). The first banking facility
amounts to RM20 million and is in the form of RM5 million being
a 'Flexi Loan' and RM15 million being a bridging loan. The
second banking facility amounts to RM5 million in the form of a
further 'Flexi Loan'. These banking facilities were in turn secured
E by amongst others, firstly fixed and floating charges over the assets
and undertaking of the respondent by a debenture dated
27 January 1999; and secondly two charges registered pursuant to
the National Land Code 1965 (the charges) over a piece of land
F belonging to the respondent held under Grant. No. 42286, Lot
No. 2431, Mukim Ayer Masin, Daerah Pontian, Negeri Johor
Darul Takzim (the land). The salient terms of the debenture are
as follows. Firstly, cl. 3.01(a) to (f) details the various assets of
the respondent covered under a fixed charge. Secondly, clause
G 3.01(g) and (h) details the respondent's assets that fall under the
floating charge. Thirdly, cl. 5.03 specifically at sub-paragraphs (d)
and (j) describes the powers of the receiver and manager to, *inter*
alia, sell the land and to execute any deed incidental to the
realization of the land. And, fourthly, cl. 5.05 specifically at sub-
para. (1)(a) states that the respondent appoints the receiver and
H manager as its attorney and to deal with the respondent's assets
including selling the land as the receiver and manager and
executing the relevant memorandum of transfer. A copy of the
debenture containing the power of attorney (as stated in cl. 5.05)
has been duly registered in the High Court of Kuala Lumpur on
I 5 March 1999. The original copy of the debenture is indorsed
with the stamp of the High Court showing the details
aforementioned.

[4] Later on, the respondent defaulted in its repayment obligations in respect of the banking facilities. As a result, AmBank in exercise of its rights under the debenture, appointed Lim Tian Huat as receiver and manager over the assets and undertaking of the respondent on 17 April 2003. Lim Tian Huat remains the receiver and manager of the respondent to-date. The receiver and manager in discharge of his duties carried out a series of tender exercises for the sale of the land and the assets thereon. In this regard, the highest offer that the respondent received for the land and the assets thereon was that from the Common Development Sdn. Bhd. (CDSB) for the sum of RM25,300,000. Following the offer received from CDSB, the respondent had entered into a sale and purchase agreement dated 14 September 2006 with CDSB for the sale of the assets for the sum of RM25,300,000 and upon the terms and conditions therein contained.

[5] Next, an important thing happened. The petitioner on 1 December 2003 presented a petition of the winding-up of the respondent. I pause here to note that the petition remains pending for determination and adjudication by this court. Now, it is the case for the respondent that the validation application in encl. 21 has been brought as a safeguard in the event that an order for the winding-up of the respondent is made on the petition. According to the petitioner, the application in encl. 21 is without prejudice to the respondent's opposition to the petition and is not to be construed as a concession on the part of the respondent that a winding-up order should be made on the petition.

[6] Before going any further, it is important to note that prayer 2 of encl. 21 seeks the validation of the sale of the assets under the sale and purchase agreement pursuant to s. 223 of the Act in the event that an order for the winding-up of the respondent is made on the petition. Section 223 of the Act provides:

Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[7] Before me, learned counsel for the petitioner has raised four grounds in opposing the respondent's application in encl. 21.1 shall deal with each of them in turn.

- A [8] The first one relates to the complaint that the sale of the said land must be by way of foreclosure proceedings under the National Land code 1965 (the Code). Learned counsel for the petitioner has referred me to the case of *Kimlin Housing Development Sdn Bhd (Appointed receiver and manager) (In liquidation)*
- B *v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274 to support his argument that the receiver and manager in the present case was not entitled to sell the charged land without taking proceedings under the Code. I am unable to agree with what has been argued by learned counsel for the petitioner. In *Kimlin*, the
- C borrower company ('the appellant') was the registered proprietor of certain lands ('the lands'). The appellant executed two legal charges ('the charges') under the Code over the lands in favour of Bank Bumiputra (M) Bhd ('the first respondent') to secure banking facilities granted to the appellant. The charges were duly
- D registered under s. 108 of the Act. Subsequently, the appellant executed a deed of debenture in favour of the first respondent to secure various banking facilities ('the debenture') whereby the appellant created both a fixed charge and a floating charge. The debenture was duly registered pursuant to s. 108 of the Act. The
- E debenture provided, *inter alia*, for the bank to appoint receivers and managers and for such receivers and managers to have certain powers. Subsequently, events occurred upon which the powers to appoint receivers and managers under the debenture became exercisable. On 13 August 1987, pursuant to such powers, the
- F bank duly appointed the second, third and fourth respondents as receivers and managers of the appellant ('receivers and managers'). Since there was no express provision in the debenture appointing them attorneys of the appellant and being desirous of selling the lands without resorting to proceedings under the Code to obtain
- G a judicial sale, the receivers and managers applied to the High Court by way of originating summons for leave to sell the lands. On 27 February 1989, the appellant went into liquidation and the liquidator opposed the application by the receivers and managers. The Federal Court in *Kimlin* held, *inter alia*, that the receivers and
- H managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the Code to obtain a judicial sale.
- I [9] I need to say something about that case. In *Kimlin*, there was no express provision appointing the receivers and managers as the attorneys of the borrower company. In the case at hand, there is a provision for the appointment of an attorney. What's

more the debentures in the present case empowers the receiver and manager to act as lawful attorney and agent of the respondent and to exercise the powers under the debenture. Furthermore, in *Kimlin*, the chargor/company was already wound-up. In the present case, I would like to lay emphasis that the respondent is yet to be wound-up. Thus, in my view, *Kimlin* is not applicable to the facts of the case herein seeing that case is distinguishable on its facts.

[10] This brings me to the case of *Melantras Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* [2000] 3 CLJ 127. In my view the facts of the case of *Melantras* is closer to the facts in the present case. There, the first respondent/plaintiff was the registered proprietor of the lease of the land. The first respondent had created in favour of the second respondent a debenture as well as a legal charge registered under the Code 1965. The second respondent had pursuant to the provisions of the debenture appointed a receiver and manager in respect of all assets and undertakings of the first respondent. The receiver and manager had, as the receiver of the first respondent entered into a sale and purchase agreement with the appellant/first defendant to sell the lease to the appellant. Subsequently, the appellant did not wish to proceed with the agreement on the grounds that the receiver and manager did not have the right or capacity to sell, by contract only, the lease in view of the Federal Court decision in *Kimlin*. The first respondent applied for a declaration that the sale and purchase agreement between the first respondent and the appellant was valid and binding which was granted. The appellant appealed. The issue in dispute was whether the receiver and manager of the first respondent was entitled to sell the lease on behalf of the first respondent. In dismissing the appeal, the Court of Appeal in *Melantras* held that the administrative receivers/managers are the authorized agents of the company under the debenture and as such are authorized to enter into any sale and purchase agreement on the assets of the company, subject however to the obtaining of the prior consent of the debenture holders and which consent was freely given by the second respondent to the court. Under these circumstances, the administrative receivers/managers are to be agents of the company and are thus absolutely free and empowered to dispose off the assets of the company and their act binds the company. I think it is very useful to refer to what was said by Abdul Malek Ahmad JCA (as His Lordship then was) when delivering the judgment of the Court of Appeal in *Melantras* at p. 129:

- A** Our task was made easier by the fact that the presiding judge hearing this appeal was a member of the panel in the *Kimlin* case and we are in total agreement with the learned counsel for the first respondent's skeletal submissions as to the distinguishing features in that case and in this appeal that we found it quite unnecessary to hear his reply nor the reply from learned counsel
- B** for the second respondent. The distinguishing features are:
- (a) in the *Kimlin* case, the chargor company was wound-up and consequently, the receivers and managers ceased to be agents of the chargor company;
- C** (b) in the present case, the chargor was not wound-up;
- (c) the debenture under consideration here empowers a receiver and manager appointed under the debenture to act as agent of the first respondent, in the exercise of the powers accorded to the receiver and manager under the debenture;
- D** (d) the debenture under consideration here contains a validly constituted power of attorney clause, irrevocably appointing the receiver and manager the lawful attorney of the first respondent;
- E** (e) the provisions of the Code deal with the powers of a chargee to sell land charged under the Code so that any receiver and manager appointed by the creditor of the charged property must conform to the Code;
- F** (f) at any time before an order for sale is made, a chargor can sell land charged under the provisions of the Code by way of private treaty where the proceeds of sale are sufficient to settle the outstanding debt or where the chargee consents;
- G** (g) where an order for sale has been obtained, the charged land must be sold by public auction, subject to the right of the chargor to pay off its indebtedness to the chargee in full to the registrar of the court before the sale of the charged land, under the provisions of s. 266 of the Code;
- H** (h) the first respondent in the present case, as the registered proprietor of the lease, is entitled to deal with the lease in such manner as a registered proprietor would, subject to the rights of the encumbrancer, namely, the second respondent.
- I** We hasten then to add that in the *Kimlin* case, it was the borrower company that was complaining about the sale apart from being wound-up whereas here it is the borrower company that is asking for the sale order and it has never been wound-up.

[11] After that, *Melantrans* was brought before the Federal Court. The issue before the Federal Court was whether the facts in *Melantrans* case were distinguishable from the facts in *Kimlin* entitling the receiver and manager to sell the lease by private treaty. This was because the first respondent was not wound-up, and there was an express provision under the debenture appointing the receiver and manager as the lawful attorney of the first respondent. The following passages in the judgment of the Federal Court in *Melantrans Sdn Bhd v. Carah Enterprise Sdn Bhd & Anor* delivered by Mohamed Dzaiddin FCJ [2003] 2 CLJ 86 (as His Lordship then was) at p. 94 is of relevance:

From the facts in *Kimlin*, it is abundantly clear to us that the debenture dated 29 June 1985 created by the appellant in favour of the first respondent did not contain an express provision appointing the receivers and managers as attorney of the appellant. Secondly, on 27 February 1989, the appellant went into liquidation. Hence, it was the liquidator who opposed the application for sale under the debenture in the High Court, and later caused an appeal be brought before the Supreme Court.

Thus, on the given facts, we have no reason to disagree with the *ratio decidendi* of the Supreme Court in *Kimlin* except to make one observation that the Supreme Court did not consider the position of the receiver and manager as the agent of the appellant company which went into liquidation.

We agree with *Kimlin* that Part XVI of the NLC deals with the rights and remedies of parties under a statutory charge over land. **Section 256(2) NLC** provides:

Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance (emphasis added)

Clearly, the section provides a prescribed method of sale to be undertaken by a chargee not a chargor. In the instant appeal, however, the sale was undertaken by the R & M on behalf of the first respondent, the chargor of the said lease. In our view, the provisions of NLC prescribing for judicial sale could not apply to the facts in the instant appeal because the R & M was acting as agent of the chargor.

Encik Ng Chew Hor, for the appellant also submitted that the power of attorney given to R & M under the debenture was an attempt to avoid the effect of and was but a means to contract

- A out of the provisions of NLC and was therefore void. Looking at the debenture in the Appeal Record, we are satisfied the said power of attorney complied with ss. 3(2) and 4(1) of the Powers of Attorney Act 1949. In our view, the R & M could act and exercise the power under the debenture. We therefore find no merit in counsel's contention that the power of attorney was a means to contract out of the provision of NLC.
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Finally, we agree entirely with the Court of Appeal and Encik Naban's submission that there are distinguishing features in Kimlin and in the instant appeal.

- C For reasons stated above, it is our conclusion that the *ratio decidendi* of Kimlin cannot apply to the instant appeal.

- [12] In my view, based on the facts as presented before me, the principle in *Melantrans* is applicable to the case at hand. Thus, in my judgment in the present case the receiver and manager could act and exercise the power under the debenture *vis-a-vis* the power of attorney to sell the said land without taking proceedings under the Code to obtain a judicial sale.
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- E [13] Turning now to the second ground, the point taken by learned counsel for the petitioner is in connection with the contention that the power of attorney, which appoints the receiver and manager as attorney of the respondent, is invalid and/or void for uncertainty. The important point to note here is that this issue was never raised in any of the petitioner's affidavit. The petitioner cannot now challenge the power of attorney and/or the debenture. In any event, I am unable to agree to learned counsel's argument that the difference in the date of the debenture and attestation clause renders it void for uncertainty. In my view there is no confusion as to the date stated in the debenture. Regarding the purported ambiguity as to the identity of the attorney, looking at the affidavit evidence before me, the identity of the receiver and manager is clearly determinable, being one En. Lim Tian Hua. In this regard the bank had lodged the relevant notice of appointment to the registrar of companies informing of his appointment as the receiver and manager (see: exh. LTH 2 of respondent's 1st affidavit). Accordingly, the power of attorney is clearly valid and not void for uncertainty. I am for that reason unable to agree with the submission of learned counsel for the petitioner on the second issue.
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[14] I shall now deal with the third ground raised by learned counsel for the petitioner which is directed against the proposed total sale price of the said land and the assets thereon which is known as Kukup Golf Resort at RM25.3 million which, as contended by the petitioner, is grossly undervalued. The petitioner's contention is that the said sale price is below market value of RM72.5 million. In the first place the report by KGV Lambert Smith Hampton was issued in August 2002 for management purposes. There is no evidence that the land could have in any event been sold at the sale price of RM72.5 million. The important point to note here is that the valuation report prepared by Khong & Jaafar Sdn Bhd dated April 2004 states that the market value of the property was RM26.7 million and that the report was prepared for the purpose of a sale by public auction. It would appear that the offers which were received by the respondent from the open market were all in the region of RM15 million and RM26.6 million, none of which were even close to the purported value of RM72 million as suggested by the petitioner. In addition, in the 2nd affidavit of the respondent it has been explained in some detail on the various efforts made by the receiver and manager to sell the property according to its true commercial value. These efforts include the open tender exercise by way of public advertisements in the newspapers. In *Malayan Banking Bhd v. Lim Poh Ho & Anor* [1997] 2 CLJ 516 Mahadev Shanker JCA speaking for the Court of Appeal said at p. 526:

The true commercial value of a property is not what any valuer thinks it should be, but the actual price that property will fetch when it is put up for sale in the open market. When there were no bidders at the first four public auctions, all of which were advertised, the only inference possible is that the reserves were too high. At the last auction, the reserve was RM56,000. So, the only finding possible was that the true market value was RM56,000 because that was all an impartial buyer was prepared to pay for it.

Any finding to the contrary required positive evidence from the borrowers that the auction was fraudulently or so recklessly or negligently conducted that there were genuine buyers who would have come and bid to buy the property at RM100,000 if they had been given an opportunity to do so. No such evidence was called by the borrowers.

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A [15] In my judgment, based on the affidavit evidence, it has been established that through the various open and closed tenders exercise carried out, the price of RM25.3 million is a true commercial market value of the land and the assets thereon. On the other hand, there is no concrete proof to support the
B petitioner's allegation that the market value of the assets is RM72 million. To my mind, the said land is being sold at market value and not grossly undervalued as alleged by the petitioner.

C [16] Which brings me to the fourth and the last point taken by learned counsel for the petitioner. He argued that it is inequitable to allow the bank to take all and leave nothing for the petitioner because the petitioner had obtained judgment prior to the creation of the debenture. I am unable to accede to this contention for the reason that equity cannot help the petitioner in the circumstances
D of this case. AmBank is a secured creditor. The petitioner, who is an unsecured creditor, cannot override the bank's legal right. Undeniably, Ambank has legal charges over the land. In the event of a foreclosure, Ambank would receive the full proceeds of sale of the land first as a secured creditor and in such an event equity
E would not assist the petitioner.

F [17] In the present case the receiver and manager under the power of sale conferred on him under the debenture had carried out the exercise of the sale of the assets by way of the sale and purchase agreement. The proceeds of sale derived from the sale are to be used towards reduction of monies owing by the respondent under the banking facilities. Even assuming that a winding-up order were to be made against the respondent, Ambank would be entitled as a secured creditor of the respondent
G to be paid first in preference over other unsecured creditors of the respondent, which includes the petitioner. The authority to support this proposition is to be found in the judgment of Wan Yahya bin Pawan The FCJ in *Director of Customs, Federal Territory v. Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)* [1995] 3 CLJ 316. There, His Lordship had this to say at p. 326
H of the report:

I When a company goes into liquidation, and a liquidator is appointed the floating charge automatically crystallizes, - see *Hubbuck v. Helms* [1887] 56 LJ Ch at 538; *Robson v. Smith* [1895] 2 Ch 118 at 124-125; *Government Stocks & Other Securities Investment Co, v. Manila Railway Co. (supra)*; *Evans v. Rival Granite Quarries Ltd.* [1910] 2 KB at 990. On crystallization the

floating charge which had until then remained suspended, becomes fixed and attaches itself to the charged assets of the company. Simultaneously the charge holders' interest becomes a proprietary interest capable of defeating the competing interests of unsecured creditors. The position of a secured creditor as referred to by Williamson J in *Re Your Size Fashions Ltd.* [1990] 3 NZLR at 733 is as follows:

A secured creditor is entitled to stand aloof from the liquidation. Such a creditor may appoint a receiver and be entitled to interest due under an interest bearing security to the date of payment of principal sum.

If he proves in liquidation, however, interest ceases at the date of winding-up; (see *Re Securitibank Ltd* [1980] 2 NZLR 714 at p. 728). The dominant position of a secured creditor is emphasized by the provisions of s. 3(3) of the Insolvency Act 1967 (made applicable by s. 307 of the Companies Act 1965).

The status of a secured creditor in our companies winding-up is spelled out in s. 291(2) of our Companies Act 1965:

Subject to s. 292, in the winding-up of an insolvent company the same rules shall prevail and be observed with regard to the respective right of secured and unsecured creditors and debt provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding-up and make such claims against the company as they respectively are entitled to by virtue of this section.

(see also: *K Balasubramaniam (Likuidator bagi Kosmopolitan Credit & Leasing Sdn Bhd) v. MBf Finance Bhd & Ors* [2005] 1 CLJ 793, and *HSBC Bank Malaysia Bhd v. Tirathrai Sdn Bhd* [2003] MLJU 353). Hence, no prejudice would be occasioned to the general body of creditors of the respondent should encl. 21 be granted.

[18] To sum it up, for the reasons given, I would grant order in terms of prayers (2), (3) and (4) of encl. 21 with costs.

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